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BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of:
Dudek

Serial No.: 09/843,257

Filed: April 25, 2001

For: Product Delivery System

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Atty. Dkt. No.: TS9246 (US)
(013129-00580)

Group Art Unit: 3721

Examiner: Nash, Brian D.

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APPEAL BRIEF

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8/5/04 D. Brit Nelson
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APPEAL BRIEF

Appellants hereby timely submit this replacement Appeal Brief, in triplicate, in response to the July 9, 2004 Notification of Non-Compliance with 37 C.F.R. § 1.192(c); the Notice of Appeal being filed on April 15, 2004 and a Final Office Action dated October 29, 2003. The requisite fee set forth in 37 C.F.R. § 1.17(c) has been debited from the Locke Liddell & Sapp LLP Deposit Account No. 12-1322/013129 and the Commissioner is authorized to deduct any other fees from Deposit Account deemed necessary to make this document timely.

I. REAL PARTY IN INTEREST

The real party in interest in this appeal is Shell Oil Company, a corporation created and existing under the laws of Delaware, United States, to whom this Application has been assigned.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences.

III. STATUS OF CLAIMS

Claims 1-11 and 24-29 are pending and stand rejected for which the Appellants bring the present appeal to the Board. The majority of the claims, including the three independent claims 1, 24, 27, stand rejected under 35 U.S.C. § 103(a) over U.S. Pat. No. 5,996,316 (*Kirschner*) in view of Official Notice and further in view of U.S. 5,685,435 (*Picioccio*). Dependent claim 3 stands rejected under 35 U.S.C. § 103(a) over *Kirschner* in view of Official Notice and further in view of alleged admitted prior art. The claims were also rejected under 35 U.S.C. § 112 for informalities, which were addressed via amendment in the Response to the Final Office Action. Accordingly, the claims on appeal are Claims 1-11 and 24-29. A copy of the claims on appeal is set forth in the *Appendix*.

IV. STATUS OF AMENDMENT

After the Final Office Action, a response was filed to amend the claims. Claims 1, 4-11, 24-25, and 27-28 were amended to add the term “household cleaning and detergent” consumer products to agree with the preamble in each independent claim. The amendments, without prejudice, addressed the Examiner’s antecedent basis rejection in the Final Office Action. The resulting Advisory Action does not state whether the Examiner entered the amendment for purposes of appeal.

V. SUMMARY OF THE INVENTION

The present invention represents an entirely new paradigm in the field of dispensing household and cleaning products that is not taught, shown, or suggested by the cited references of Official Notice. In general, the invention fulfills a need in the cleaning product and detergent

industry that heretofore has simply gone unmet even with years of motivation, which with prohibited hindsight may seem apparent. The invention provides for shipping household cleaning and detergent consumer products in bulk containers to a retail site and then dispensing the bulk household cleaning and detergent consumer products into individual storage containers at the retail site. Such aspects are, for example, claimed in independent claims 1, 24, and 27; described on p. 2, ll. 3-13; p. 4, ll.1-14; p. 10, l. 23-p. 11, l. 13; and p. 12, ll. 1-4; and illustrated in Fig. 1, for example, as elements 5, 6, 14, 15, and 19.

As merely one non-limiting example, the ability to dispense at the retail site allows for concentrated delivery and optional reconstitution at the retail site. (*See, e.g.*, p. 4, ll. 1-24; and Fig. 1, elements 5, 12.) Further, this aspect is specifically claimed in independent claim 24, which recites that the household cleaning and detergent consumer products are delivered in concentrated form and then reconstituted at the point of dispense at the retail site. For decades in this field, the household cleaning and detergent consumer products have been delivered in their *final* retail form for dispense without reconstituting. (*See, e.g.*, p.1, ll. 9-15.) Similar subject matter is also claimed in claims 4-6, being dependent on independent claim 1.

Still further, dependent claims 7-8, 25 recite that the household cleaning and detergent consumer products that were reconstituted at the retail site are dispensed from a vending machine. (*See, e.g.*, p. 4, ll. 10-24; p. 5, ll. 21-24.) Dependent claim 26 further recites that the household cleaning and detergent consumer products are delivered into reusable containers. (*See, e.g.*, p. 8, l. 17-p. 9, l. 21; and Fig. 1, element 19.) In this field, the containers are generally discarded. The present invention represents an improvement in the field.

Independent claim 27 recites that the household cleaning and detergent consumer products are shipped in bulk form and then transferred to and dispensed from a vending machine into the individual storage containers at the retail site for retail to the consumer. (*See, e.g.*, p. 2, ll. 3-13; p. 4, ll. 1-14; p. 11, ll. 3-17; and p. 12, ll. 1-4; and illustrated in Fig. 1, for example, as elements 5, 6, 14, 15, and 19.) It is well known to dispense the prepackaged, predelivered, and presorted individual containers—it is not known and there is no teaching, showing, or suggestion to transfer from the bulk container at the retail site to the individual storage containers at the retail site for resale through the vending machine at the site. Dependent claim 28 recites that the household cleaning and detergent consumer products are concentrated and then reconstituted at the retail site. (*See, e.g.*, p. 4, ll. 1-24; and Fig. 1, elements 5, 12.) No reference teaches, shows, or suggests the limitations of claim 28. Dependent claim 29 further recites that the household cleaning and detergent consumer products are delivered into reusable containers. (*See, e.g.*, p. 8, l. 17-p. 9, l. 21; and Fig. 1, element 19.) As stated above, containers are generally discarded in this field for household cleaning and detergent consumer products and the Examiner provides no reference that teaches, shows, or suggest otherwise.

The present invention represents an entirely new approach in this field. For example, in the prosecution, the Examiner stated that a Laundromat provides containers of detergent dispensed to demonstrate the obviousness of the present invention. (Office Action dated August 12, 2003.) Yet, it was that very example that distinguishes the present invention from the state of the art. In the Laundromat example, individual containers of household cleaning and detergent consumer products are already prepackaged, predelivered, and presorted in the *final* retail form. The Examiner continued the Laundromat line of reasoning in the Final Office Action, when he stated that systems for transfer from a bulk container to a storage container (at a manufacturing

facility), and the incorporation of a vending machine at a retail location are well known and expected. (Final Office Action dated October 29, 2003.)

This line of reasoning is in error and misses the impact of the present invention, as these aspects are in stark contrast to the invention. The Examiner's examples relate to packaging performed at a manufacturing facility, and then transported in a prepackaged final retail form at the retail locations, in contrast to the bulk dispensing of household detergent and cleaning products at the retail location. Despite the advantages, there simply has not been an option to dispense from bulk containers in this particular field, namely, household cleaning and detergent consumer products at the retail site for retail to the consumer. (*See, e.g.*, p. 1, ll. 9-15.)

VI. ISSUES

The issues on appeal are premised on the grounds of rejection set forth in the Final Office Action.

A. Whether the claims are unpatentable under 35 U.S.C. § 112 in light of an antecedent reference.

B. Whether independent claims 1, 24, and 27 with accompanying dependent claims are unpatentable under 35 U.S.C. §103(a) over U.S. Pat. No. 5,996,316 (*Kirshcher*) in view of Official Notice and further in view of U.S. 5,685,435 (*Picioccio*).

VII. GROUPING OF THE CLAIMS

A. For the purposes of the rejection under 35 U.S.C. § 112 in this appeal, claims 1-11 and 24-29 stand or fall together.

B. For the purposes of the rejection under 35 U.S.C. §103(a) in this appeal, independent claim 27 does not stand or fall with independent claims 1 and 24.

VIII. ARGUMENT

A. Whether the claims are unpatentable under 35 U.S.C. § 112 in light of an antecedent reference.

Claims 1-11 and 24-29 were rejected under 35 U.S.C. § 112 for informalities. The Examiner states that “products” needs to refer to “household cleaning and detergent” consumer products. It is believed that there was no lack of clarity in the claims and the rejection was in error, because the subsequent uses of the “consumer products” referred with antecedent basis back to the “household cleaning and detergent” consumer products recited in the preamble and in the first element of each independent claim. However, for the sake of furthering the application, Applicants chose to amend claims 1, 4-11, 24-25, and 27-28, without prejudice, to address this informality raised by the Examiner in the Final Office Action. Thus, it is believed this rejection has been mooted. However, the Examiner did not indicate whether this rejection was withdrawn in the Advisory Action or the amendment entered for purposes of appeal and therefore in an abundance of caution, the Applicants include an appeal on this rejection as well.

B. Whether independent claims 1, 24, and 27 with accompanying dependent claims are unpatentable under 35 U.S.C. §103(a) over U.S. Pat. No. 5,996,316 (*Kirshcher*) in view of Official Notice and further in view of U.S. 5,685,435 (*Picioccio*).

In rejecting the above claims, the Examiner admitted that *Kirschner* does not specifically show removing the bulk container from a pallet and transfer of product from the bulk container into an individual storage container for retail to the consumer, a beverage as a concentrated form that can be reconstituted later, or the use of a vending machine. In the first Office Action, the Examiner took Official Notice that removing bulk containers from palletized loads, transferring a product from a bulk container to a individual storage container for consumer use, transferring a soft drink syrup in a concentrated form, and incorporation of a vending machine are well known and expected in the art. The Examiner also stated that the system of *Kirschner* could be extended to soft drinks, coffee, and other consumer products.

In the Final Office Action, the Examiner cited *Picioccio* in combination with *Kirschner* to teach the concept and system for automated bulk vending of products at a retail location to give consumers selective options of blends from a plurality of products. Without evidence, the Examiner stated that it would have been obvious to include household cleaning and detergent consumer products in concentrated bulk form to be later reconstituted at a retail location.

1. *Summary*

The rejection is in error. The Examiner has not produced any required evidence in the nature of applicability of cited references to the particular field of the claimed subject matter. Neither of the cited references are applicable or properly combined. The Examiner appears, at least in the first Office Action, to have relied on Official Notice and extensions of the teachings to reject the claims. However, even the Examiner did not extend Official Notice to household cleaning and detergent consumer products. Thus, combining the two references, together or with Official Notice, does not rise to the level required by case law to state a case of *prima facie*

obviousness on the claimed subject matter of household cleaning and detergent consumer products. The only example the Examiner supported with his earlier comments (believed to be part of the prior Official Notice) was a Laundromat example. Yet, that very example teaches away from the present invention and represents prior art in this field, where the individual containers of household cleaning and detergent consumer products are already prepackaged, presorted, and predelivered in the *final* retail form.

Further, *Picioccio* teaches away from *Kirschner* and is improperly combined. Despite the long felt need, the solution provided by the present invention was not seen by those with ordinary skill in the art prior to the present invention.

Whether relying on references or on Official Notice or both, the Examiner has not provided any evidence of the claimed subject matter through properly combined references and especially to household cleaning and detergent consumer products and the claims are believed to be allowable.

2. *The legal requirements for combining Kirschner with Picioccio are not satisfied.*

The cited references, among other things, relate to entirely different fields than the present invention and the Official Notice does not supply the household cleaning and detergent consumer products limitations in the claims. To the extent the Examiner's rejection seeks to supply the required motivation to combine through the nature of the problem, this aspect is also impermissible. *Teleflex Inc. v. Ficosa North America Corp.*, 63 USPQ2d 1374, 1387 (CA FC 2002) (citing *In re Dembiczak*, 175 F.3d 994, 999, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999)). "The showing of a motivation to combine must be clear and particular, and it must be supported by actual evidence." *Id.*

In *In re Dembiczak*, cited above, the Federal Circuit reversed the Patent Office, which attempted to combine children's art on decorated paper bags with plastic garbage bags to reject claims having art on plastic garbage bags. *Id.* at 1614. While children's art on decorated paper bags and garbage bags are each well known, there was no motivation to combine them, absent impermissible hindsight. The Court clearly held that the motivation was not present in the combination.

All the obviousness rejections affirmed by the Board resulted from a combination of prior art references, e.g., the conventional trash or yard bags, and the Holiday and Shapiro publications teaching the construction of decorated paper bags. To justify this combination, the Board simply stated that "the Holiday and Shapiro references would have suggested the application of . . . facial indicia to the prior art plastic trash bags." However, rather than pointing to specific information in Holiday or Shapiro that suggest the combination with the conventional bags, the Board instead described in detail the similarities between the Holiday and Shapiro references and the claimed invention, noting that one reference or the other--in combination with each other and the conventional trash bags--described all of the limitations of the pending claims. Nowhere does the Board particularly identify any suggestion, teaching, or motivation to combine the children's art references...

Id. at 1617-1618.

Three basic criteria must be met by the Examiner to establish a *prima facie* case of obviousness, according to the MPEP. There must: be a suggestion or motivation to modify the reference or combine references teachings, be a reasonable expectation of success, and teach or suggest all the claim limitations. (MPEP §§ 2142-2143.) Further, it "is difficult but necessary that the decision maker forget what he or she has been taught . . . about the claimed invention and cast the mind back to the time the invention was made (often as here many years), to occupy the mind of one skilled in the art *who is presented only with the references, and who is normally guided by the then-accepted wisdom in the art.*" (MPEP § 2141.01, emphasis added, citing *W.L. Gore & Associates, Inc., v. Garlock, Inc.*, 723 F.2d 1540, 220 USPQ 303, 313 (Fed. Cir. 1983), *cert. denied*, 469

U.S. 851 (1984)). “The references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention.” MPEP § 2141 (citing *Hodosh v. Block Drug Co., Inc.*, 786 F.2d 1136, 1143 n.5, 229 USPQ 182, 187 n.5 (Fed. Cir. 1986)).

Further, no reference is cited and no evidence is provided that supports the rejection of these and other features as merely matters of design choice, as required by case law. *In re Dembiczak*, 50 USPQ2d at 1617-1618; *see also*, *ACS Hosp. Sys., Inc. v. Montefiore Hosp.*, 221 USPQ 929, 933 (Fed. Cir. 1984) (“Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination.”).

The Federal Circuit has clearly and explicitly held that in order for references to be combined, the references themselves must explicitly teach or suggest the combination as well as the potential benefit which may be derived from such a combination. *In re Fritch*, 23 USPQ2d 1780 (Fed. Cir. 1991); *In re Vaeck*, 20 USPQ2d 1438 (Fed. Cir. 1991); *In re Bond*, 15 USPQ2d 1566 (Fed. Cir. 1990); *In re Dillon*, 13 USPQ2d 1337 (Fed. Cir. 1989); *Pipeline Dehydrators, Inc. v. Southeast Pipeline Contractors, Inc.*, 11 USPQ2d 1375 (Fed. Cir. 1989); *Smith Kline Diagnostics, Inc. v. Helena Laboratories Corp.*, 8 USPQ2d 1468 (Fed. Cir. 1988); *Carella v. Starlight Archery*, 231 USPQ 644 (Fed. Cir. 1986); and *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 221 USPQ 929 (Fed. Cir. 1984).

The Examiner has not identified any teaching or suggestion or any benefit from within *Kirschner* and *Picioccio* for combining the references in the manner suggested by the Examiner. It appears that the Examiner is using impermissible hindsight gained from the present invention to form the basis for combining *Kirschner* with *Picioccio*.

3. *Kirschner teaches a differently methodology, product, and field than the present invention.*

First, the Examiner admits that *Kirschner* does not disclose a household cleaning and detergent product. The Examiner further admits that *Kirschner* does not specifically show removing the bulk container from a pallet and transferring product from the bulk container into an individual storage container for retail to the consumer, a beverage as a concentrated form that can be reconstituted later, or the use of a vending machine.

Kirschner is applicable to a palletized assembly line at a manufacturing facility. It teaches packaging in a final retail form and loading onto that package onto pallets. It teaches very little, if anything, to do with dispensing at a retail outlet. It has nothing to do with household cleaning and detergent consumer products.

4. *Picioccio does not apply to Kirschner .*

Second, *Picioccio* states in the Background section that known vending machines, such as candy and snack machines, dispense candy bars, bagged candies, chips, and the like in fixed packaged portions. *Picioccio* also describes vending greeting card kiosks that allow flexible customer selections and input. *Picioccio* further describes customers manually selecting a desired amount of candy or groceries from a grouping and bagging the selection. *Picioccio* then provides a solution to distributing bulk items through a vending machine, primarily M&M[®] candies as used in the examples.

There is no teaching in *Picioccio* that would lead one in the detergent and household cleaning consumer products field to depart from the decades-long teaching prior art in that field, absent use of prohibited hindsight after learning of the present invention.

Stated differently, *Picioccio* teaches an improved candy-dispensing machine. *Kirschner* teaches a palletized loading delivery system. Neither teaches anything about household cleaning and detergent consumer products in any form, much less bulk form. There is certainly no identified need or benefit found in combining the references as required, suggesting the present invention.

Independent claim 1 requires a system adapted, among other aspects, to fill one or more household cleaning and detergent consumer products into one or more bulk shuttle reservoirs, and transfer the household cleaning and detergent consumer products contained in said bulk shuttle reservoirs to individual storage containers at the retail site. Further, independent claim 27 requires a transfer of the household cleaning and detergent consumer products to and dispense from a vending machine into individual storage containers at the retail site. By the Examiner's admission, *Kirschner* does not teach such, and *Picioccio* does not supply the missing elements, alone or in combination with *Kirschner*.

Independent claim 24, reciting different subject matter from either claim 1 or claim 27, requires a system adapted, among other aspects, to fill one or more household cleaning and detergent consumer products into one or more bulk shuttle reservoirs, transport said one or more bulk shuttle reservoirs to the retail site, reconstitute said one or more household cleaning and detergent consumer products at the retail site, and transfer the household cleaning and detergent consumer products contained in said bulk shuttle reservoirs to individual storage containers at the retail site. By the Examiner's admission *Kirschner* does not teach such, and *Picioccio* does not teach reconstitution at the retail site. The combination fails to provide the recited elements of claim 24.

5. *Picioccio and Kirschner teach away from each other.*

Further, *Picioccio* and *Kirschner* teach away from each other. As described above, *Picioccio* teaches an improved candy dispensing machine that dispenses non-packaged quantities of candies. *Kirschner* teaches loading prepackaged beverage containers on pallets for ultimate sale to a consumer as a prepackaged container. *Picioccio* specifically identifies the prepackaged container vending machine as prior art and distinguishes his invention from such prepackaged container systems.

To combine *Picioccio* with *Kirschner* would undo what *Picioccio* expressly states is different—even aside from there being no teaching, showing, or suggestion of anything related to household cleaning and detergent products.

CONCLUSION

In conclusion, the cited references, alone or in combination, do not teach, show, or suggest the present invention. Therefore, it is believed that the rejections are erroneous and the claims are in condition for allowance. A decision of the Board consistent with this showing is earnestly requested.



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IX. APPENDIX

Pending Claims

1. (Previously presented) A product delivery system wherein household cleaning and detergent consumer products are delivered in bulk to a retail site, said product delivery system adapted to:
 - (i) manufacture and optionally blend one or more said household cleaning and detergent consumer products at a product manufacturing site;
 - (ii) fill said one or more household cleaning and detergent consumer products into one or more bulk shuttle reservoirs;
 - (iii) place said one or more bulk shuttle reservoirs onto one or more pallets;
 - (iv) transport said one or more pallets to the retail site;
 - (v) remove one or more of said bulk shuttle reservoirs from said pallets; and
 - (vi) transfer the household cleaning and detergent consumer products contained in said bulk shuttle reservoirs to individual storage containers at the retail site for retail to the consumer.
2. (Original) The product delivery system according to Claim 1, wherein said one or more pallets are transported through a product distribution network prior to the transport to the retail site.
3. (Original) The product delivery system according to Claim 1, wherein the bulk shuttle reservoirs comprise a dry break coupling system.

4. (Previously presented) The product delivery system according to Claim 1, wherein the one or more household cleaning and detergent consumer products are in a concentrated form.
5. (Previously presented) The product delivery system according to Claim 4, wherein said system is adapted to optionally allow consumer product reconstitution prior to the transfer of the household cleaning and detergent consumer products to the individual storage containers.
6. (Previously presented) The product delivery system according to Claim 5, wherein the optional reconstitution and subsequent transfer of the one or more household cleaning and detergent consumer products to said individual storage containers is automated.
7. (Previously presented) The product delivery system according to Claim 1, wherein the one or more household cleaning and detergent consumer products are transferred to, optionally reconstituted in, and dispensed from a vending machine into said individual storage containers.
8. (Previously presented) The product delivery system according to Claim 4, wherein the one or more household cleaning and detergent consumer products are transferred to, optionally reconstituted in, and dispensed from a vending machine into said individual storage containers.
9. (Previously presented) The product delivery system according to Claim 1, wherein the one or more household cleaning and detergent consumer products are transferred into a reusable individual storage container.

10. (Previously presented) The product delivery system according to Claim 4, wherein the one or more household cleaning and detergent consumer products are transferred into a reusable individual storage container.

11. (Previously presented) The product delivery system according to Claim 10, wherein said system is adapted to optionally allow consumer product reconstitution prior to the transfer of the household cleaning and detergent consumer products to the individual storage containers.

Claims 12-23 (Cancelled)

24. (Previously presented) A product delivery system wherein household cleaning and detergent consumer products are delivered in bulk to a retail site, said product delivery system adapted to:

- (i) manufacture and optionally blend one or more of said household cleaning and detergent consumer products at a product manufacturing site in a concentrated form;
- (ii) fill said one or more household cleaning and detergent consumer products into one or more bulk shuttle reservoirs;
- (iii) transport said one or more bulk shuttle reservoirs to the retail site;
- (iv) reconstitute said one or more household cleaning and detergent consumer products at the retail site; and
- (v) transfer said one or more reconstituted household cleaning and detergent consumer products to individual storage containers at the retail site for retail to the consumer.

25. (Previously presented) The product delivery system according to Claim 24, wherein the one or more household cleaning and detergent consumer products are transferred to and dispensed from a vending machine at the retail site into said individual storage containers.

26. (Previously presented) The product delivery system according to Claim 24, wherein said individual storage containers for said household cleaning and detergent consumer products comprises reusable containers.

27. (Previously presented) A product delivery system wherein household cleaning and detergent consumer products are delivered in bulk to a retail site, said product delivery system adapted to:

- (i) manufacture and optionally blend one or more said household cleaning and detergent consumer products at a product manufacturing site;
- (ii) fill said one or more household cleaning and detergent consumer products into one or more bulk shuttle reservoirs;
- (iii) transport said one or more bulk shuttle reservoirs to the retail site; and
- (iv) transfer said one or more household cleaning and detergent consumer products to and dispense from a vending machine into individual storage containers at the retail site for retail to the consumer.

28. (Previously presented) The product delivery system according to Claim 27, wherein the one or more household cleaning and detergent consumer products are transported in a concentrated form in the bulk shuttle reservoirs and wherein said product delivery system is

adapted to reconstitute said one or more household cleaning and detergent consumer products at the retail site for dispense through said vending machine.

29. (Previously presented) The product delivery system according to Claim 27, wherein said individual storage containers for said household cleaning and detergent consumer products comprises reusable containers.